No. 13671

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

WATERFRONT EMPLOYERS OF WASHINGTON; LOCAL 19, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, *Respondents*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT LOCAL 19, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

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JURISDICTIONAL STATEMENT

The Court has been petitioned herein by the National Labor Relations Board, herein called the Board, pursuant to Section 10(e) (29 U.S.C.A. §160(e)) of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), herein called the Act, for enforcement of its order of February 26, 1952, and its supplemental order

of November 4, 1952, issued against respondents Waterfront Employers of Washington, herein called WEW; International Longshoremen's and Warehousemen's Union, herein called ILWU; and Local 19, International Longeshoremen's and Warehousemen's Union, herein called Local 19. This Court has jurisdiction of the petition by virtue of the provisions of Section 10(e) of the Act (29 U.S.C.A. §160(e)).

STATEMENT OF FACTS

A. The business of Local 19.

Local 19 is an autonomous labor organization operating under its own constitution and by-laws. It has the power to negotiate its own collective bargaining agreements. (Records page 65; page 268). It has been recognized at all stages of this proceeding as having a distinct and separate legal identity. In conjunction with the Waterfront Employers of Washington it operates on a joint control basis, a dispatching hall for longshoremen. The collective bargaining agreements allegedly in effect during the period complained of in this cause, contained language according preferential dispatching treatment to members of the union.

B. Clarence Purnell

Clarence Purnell was in the business of operating a barber shop. Occasionally he worked a shift at longshore work. He gave up longshoring completely in September of 1948. Local 19 expelled him for absenteeism. He stated

(Record page 437) that he devoted his time exclusively to his barber shop after September 28, 1948, until the summer of 1949. He, also, stated that he was too sick to work longshoring because of arthritis and a bad foot. (Record pages 438, 439.) The record is devoid of any evidence that he ever presented himself for work at the dispatching hall after his voluntary withdrawal on the above date.

Somewhere during this period Mr. Purnell conceived the unique idea of securing for himself three incomes by the assumption of three different roles.

In the first role, he would continue to secure his customary income from the operation of his barber shop. In the second role, he would obtain unemployment compensation benefits as an unemployed longshoreman, even though, on his own admission, he was physically unable to do longshore work. On this point the record is clear that when he applied for a statement from his employer for a slip to the Unemployment Compensation Commission, he was rightfully refused the same because longshore work was available for him—work which he was physically unable to perform. (Record pages 441, 442, 569, 571, 572, 573.)

In the third role, Mr. Purnell sought an award of pay for longshore work he was unable to perform by reason of physical handicap and full time duties in the operation of his barber shop on the theory that he was the victim

of an unfair labor practice. In pursuance of this three-pronged attack against the economic front, he commenced a long series of filings.

C. Albert Crum

Albert Crum was a farmer by preference who showed a repetitive history of absenteeism from the industry. He had purchased a farm in Sagle, Idaho, a place some 400 miles from Seattle, Washington, the situs of his former longshore work. He testified (Record page 386) that he quit work as a longshoreman in the first part of April, in the year of 1948, and went to work his farm in Sagle, Idaho. Later that year he returned to Seattle for a brief visit during the month of July. However, he had no intention of making himself available for work as was required of him in order that he keep his registration as a longshoreman. His own words, on page 389 of the Record, clearly show that he preferred farming to the maintaining of his duties as a longshoreman.

> "A. Well, as I say it was a wet year, something like now, and I came over here at Seattle, the first part of July, as I have already stated, and I went down to the Hall just to associate with the boys, and the dispatcher called me over to the window and he said, 'Crum, you come in and take this job.' I said, 'I don't want to work. I am just here temporarily, and I don't want to work right now.' 'Well,' he said, 'we are awfully short of men here.' He said, 'Come on and take it, and I will put you on the sling in your own gang, No. 25.' "

Because of his absences, his Union suspended him, and the Joint Labor Relations Committee cancelled his registration as a longshoreman on April 20, 1949. This was after a report of low earnings by William Laing, a clerk dispatcher in the Longshore Hiring Hall, appointed by the Joint Labor Relations Board Committee. (Record page 568.) The petitioner in its brief has erroneously referred to Mr. Laing as a Chief Dispatcher selected by the union. Mr. Laing was charged with the duty of keeping and reporting of the earning records.

On December 1, 1950, for the first time, Albert Crum filed a charge against Local 19, alleging that Local 19 had refused to dispatch him on January 29, 1949. (Record page 17.) On the day previous, November 30, 1950, Clarence Purnell filed a second amended charge which likewise, for the first time, mentioned Albert Crum. (Record page 8.) This charging of Local 19, occurred more than six months after the occurrence of any alleged discrimination respecting Albert Crum.

D. The findings of the trial examiner.

a. In respect to Albert Crum:

The trial examiner found that Albert Crum had not timely filed against Local 19, and in consequence of said laches, no complaint against Local 19 should have issued in his behalf as the same was barred under Sec. 10(b), of the Act. The pertinent words

of his findings commence on page 75 of the Record, and constitute mixed fiindings of both fact and law.

"(b) The 6-month limitation—Unions.

Both ILWU and Local 19 moved for the dismissal of the complaint as to each based upon Section 10(b) of the Act.

On February 21, 1949, Purnell filed and served his original charge against Local 19 alone, and on June 22, 1949, "amended" this charge by adding, among other things, ILWU as a party respondent. On the other hand, by some queer quirk, Crum filed his original charge on June 14, 1949, against ILWU alone, which he, in turn "amended" on December 1, 1950, by adding Local 19 as a party respondent.

By each of these so-called "amendments," the Complainants attempted to add an entirely new party respondent thereby creating a new cause of action and a new liability. Since the Coronado Coal cases (256 U. S. 344 and 268 U. S. 295), it has been well-settled law that the mere affiliation of two labor organizations is an insufficient base upon which to predicate liability, even as it is equally clear from the congressional debates on the Act that liability of the organization is not created from mere membership of the actor in that organization. Here the evidence is clear that, although affiliated with ILWU, Local 19 is an autonomous and separate distinct entity from ILWU.

Thus, in the charge of Crum, the so-called amendment of December 1, 1950, is in fact not an amendment because of the fact that it creates a new cause of action, a new liability created by the addition of a new and distinct party and thus, in truth and in fact, is an original charge as to that new party, Local 19. But, as to new material added by this amendment relating to the old original cause of action against ILWU, this amended charge is actually an amendment. As this so-called amended charge of December 1, 1950, is in fact an original charge against Local 19, Section 10(b), the 6-month limitation, is applicable thereto barring the issuance of a complaint based on any unfair labor practice occurring beyond the 6-month period prior to the filing and service of the charge. Clearly, therefore, as to Local 19, the complaint based upon Crum's charges of December 1, 1950, founded upon the execution of both the Coast Agreement and the Dock Agreement as well as the discriminatory enforcement as to him occurring on January 29, 1949, is barred by the limitation of the statutory provision."

b. In respect to Clarence Purnell:

The findings of the trial examiner concerning complainant Purnell are based purely on fact, facts which the trial examiner ascertained from his personal hearing and observation of the witnesses and their demeanor. The trial examiner found that the evidence conclusively showed that Clarence Purnell could not have been the victim of an unfair labor

practice because he was not available for work, at the time he claimed he was discriminated against.

> "Purnell's own testimony proves him to have been physically unable to accept such employment in January 1949." (Record page 94).

SPECIFICATION OF ERRORS RELIED UPON

Respondent Local 19, submits that the Board made the following errors in its decision and order respecting Local 19.

1. That Albert Crum's charge against Local 19, was timely.

2. That the trial examiner's findings and conclusions were erroneous respecting Local 19.

SUMMARY OF ARGUMENT

The position of Local 19 is substantially that the findings and conclusions of the trial examiner as expressed in his intermediate report are correct insofar as they concern Local 19.

A. Crum is barred by Section 10 (b), of the Act.

Prior to the amendment of the Act in 1947, there was no limitation on the filing of charges. New in the amended Act is a 6 months limitation. The amended Act provides in this regard that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board, and the service of a copy thereof upon the person against whom

such charge is made. A great deal more than 6 months expired before Albert Crum or anyone in his behalf filed a charge against Local 19. Thus, it is plain that the trial examiner was correct as is clearly revealed by an examination of the cases cited by the Board in sustaining its position in overriding the trial examiner in the conclusion that Crum was barred from relief against Local 19, by the operation of Section 10(b), of the Act.

National Licorice Co. v. N. L. R. B., 309 U. S. 350. If it were in point, it is not applicable, because, it was decided in 1940 when there was no 6 months limitation in the Act. This case was merely an authority for the rule that the Board had the power to deal with violations occurring subsequent to the filing of the original charge.

Katz v. N. L. R. B., 196 F.(2d) 411, 415 (C.A. 9), is also not in point because it was not concerned with bringing in new parties by way of amendment or otherwise. It is only authority for the proposition that the 6 months limitation period does not run from the execution date of a contract, but, from the time of its subsequent enforcement.

Top Mode Mfg. Co., 31 L. R. R. M. 2619, 2620 (C.A. 3); This case was also concerned with continuing violations and not the addition of new parties.

> "The amended charge alleged acts and conduct similar to those complained of in the original charge and it averred violation of the same sections of the

Act. In fact, the amended charge was practically a verbatim restatement of the original charge; it simply extended 'to the date hereof' and the allegations of the original charge."

"* * * Even without the amended charge, we think that the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects."

Superior Engraving Co. v. N. L. R. B., 183 F.(2d) 783. This case was merely concerned with the effective date of the amended Act of 1947. It has no discussion of the inclusion of new party defendants after the running of the 6 months period.

Cathey Lumber Co., 86 N. L. R. B. 157. This case is not in the slightest way similar to either the case of Albert Crum or Clarence Purnell. In the Cathey Lumber Company case, an employer refused to bargain with the union representing the majority of his employees. On November 13, 1946, the charge in this matter was filed by the union alleging unfair labor practices were being committed by the employer against the union and its members. In the complaint that was later issued by the Board the individual names of the employees discriminated against were supplied. The employer did not object.

"As the Respondent did not in its answer to the complaint object to the inclusion of allegations of

discrimination in the complaint as to these 17 men, the Respondent cannot—nor does it—claim surprise as to this matter."

In the Cathey Lumber Company case, a blanket charge was filed by the union in behalf of all employees. This initiated the investigation and left the individual names to be supplied later. No blanket charge was filed in behalf of either Crum or Purnell, or the both of them by any union or anyone. They initially both proceeded in their charges as separate individuals. They had separate cases and separate grievances. The trial examiner was indeed correct when he found that Crum waited too long to proceed against Local 19.

N. L. R. B. v. Westex Boot and Shoe Co., 190 F.(2d) 12, 13-14. This case is completely unrelated to the issues here involved. The Court merely said, "It seems to us that in this case, the complaint merely elaborated the charge with particularity."

Olin Industries, Inc.. v. N. L. R. B., 191 F.(2d) 613, 616. This again is a case not in point. It was merely concerned with the fate of pending charges filed before the effective date of the amended Act.

Cusano v. N. L. R. B., 190 F.(2d) 898, 903-904. This case has no resemblance at all to the cases of Crum and Purnell. The issue involved in this case is expressed by the Court as follows:

"We must reject petitioner's argument, for it seems clear to us that both the original and amended

charges are based on the identical fact situation—the discharge of Paladino. The allegation that petitioner violated Section 8(a) (1) is, at most, a slight change in the legal theory."

N. L. R. B. v. Kobritz, 193, F.(2d) 8, 15-16 (C.A. 1). This case discussed whether or not the filing of a third amended charge constitutes the withdrawal of a second amended charge, and, whether a complaint must issue in 6 months, but does not touch on the issues here presented.

B. The Board erred in setting aside the findings of fact made by the trial examiner.

The Board in its decision indulged itself in attacking the credibility of witnesses who were presented to it solely through the medium of a cold record. The trial examiner found that Purnell had no willingness to work, and, therefore, could not complain of being deprived of work which he had deserted and towards which he had exhibited a continued refusal of performance.

The trial examiner had the opportunity to hear the witnesses and observe their demeanor. In *National Labor Relations Board v. Swinerton*, 209 F.(2d) 511, it was said:

> "Questions of credibility are generally for the Trial Examiner, who has the opportunity to observe the demeanor of the witnesses."

The Board should have respected the Trial Examiner's appraisal of Purnell and dismissed his complaint.

CONCLUSION

Local 19 respectfully requests that the Court enter a decree denying the Board's petition and refusing to enforce the Board's order and setting aside the Board's order in its entirety as to Local 19.

Respectfully submitted,

PHILIP J. POTH,
Attorney for Respondent Local 19.

APPENDIX A

Section 10(b) of the Act (29 U.S.C.A. §160(b)) is as follows:

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, **That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made,** * * * "